Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 27 1995

In the Matter of	)	
	)	CC Docket No. 92-77
Billed Party Preference for 0+ InterLATA Calls	)	
	)	DOCKET FILE COPY ORIGINAL
In the Matter of	)	
	)	
Disclosures by Operator Service Providers Serving Public Phones	)	RM-8606

REPLY COMMENTS OF SPRINT CORPORATION

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REPLY COMMENTS OF SPRINT CORPORATION

Sprint Corporation hereby replies to the comments of other parties regarding the so-called rate "ceiling" proposed by CompTel, et al. as an alternative to billed party preference.[1]

I. INTRODUCTION AND SUMMARY

In its initial comments, Sprint opposed the CompTel "ceiling" on several grounds:

- Even if it were an effective and reasonable rate ceiling, it would not substitute for other consumer benefits of billed party preference, such as simplifying dialing patterns for all consumers and thereby placing AT&T and its competitors on an equal footing.

[1] As for the National Association of Attorneys General's (NAAG's) proposal to require additional disclosures by OSPs that charge above-competitive rates, Sprint remains of the view that this proposal is well-intentioned, but ultimately insufficient to curb anti-consumer conduct.

- No rate ceiling would cure the underlying incentives to overcharge consumers that exist in the present environment, where competition is driven by commission payments to aggregators.

- Given the Commission's lack of resources, the large number of OSPs, and the built-in incentives to charge high rates, any ceiling would be impossible to enforce as a practical matter.

- The rates in the CompTel "ceiling" are far too high.

- The "ceiling" isn't even a true ceiling; instead CompTel contemplates that above-ceiling rates could be charged, and that OSPs charging such rates should have the right to justify such rates on the basis of their own costs.

In view of the large number of special interests opposing billed party preference, it is surprising that the CompTel rate ceiling received so little support. By Sprint's tally, only three parties other than the signatories to the March 7, 1995 ex parte submission by Comptel _et al._, explicitly support the CompTel "ceiling": Frontier, Teltrust and U.S. Long Distance (which Sprint believes is a CompTel member). And since this "porous" or "invisible" rate ceiling[2] smacks of a desperate, last-ditch effort to stave off adoption of billed party preference, it is equally surprising that many opponents of billed party preference nonetheless oppose the CompTel rate

[2] Because the ceiling, as proposed, was not an absolute ceiling, Sprint, in its comments, referred to it as a "porous" ceiling. Southwestern Bell (at 5), for the same reason, more aptly described it as "invisible."

"ceiling": AT&T, Capital Network Systems, NTCA, Oncor, One Call Communications, Operator Service Company and U.S. Osiris.

The comments underscore the need for billed party preference by demonstrating an upward trend in rates fueled by the need to pay ever-higher commissions. The comments also buttress Sprint's criticisms of the CompTel invisible ceiling. Finally, there is no merit to the contentions that each OSP is entitled to charge rates based on its own costs.

II. THE COMMENTS SHOW THAT BILLED PARTY PREFERENCE -- NOT THE COMPTEL "CEILING" -- IS NEEDED

In two important respects, the comments underscore the need for, and desirability of, billed party preference. First, in Sprint's August, 1994 Comments (at 13-15) and September 14, 1994 Reply Comments (at 5-16), Sprint presented substantial evidence that the Commission, in its Further Notice,[3] had grossly underestimated the rates being charged by alternative OSPs, thereby understating the benefit to consumers from implementing billed party preference. Ameritech points out (at 1-2) that the "ceiling" rates proposed by CompTel are far higher than the $.53 per minute rate used by the Commission for carriers other than Sprint, AT&T and MCI. Ameritech observes that the CompTel "ceiling" rates for calling card calls would be $1.25 per minute for a three-minute call and $.83 for an eight-minute call. In

[3] 9 FCC Rcd 3320 (1994).

addition, APCC asserts (at 10-11) that 95 percent of the complaints supplied to it by the Common Carrier Bureau's Enforcement Division concerned rates that exceeded the proposed "ceiling." This is further evidence that the actual rates being charged by alternative OSPs today are far higher than those used by the Commission in its cost/benefit analysis of billed party preference.

A strong argument for billed party preference also emerges from the comments of Oncor, an opponent of billed party preference and a carrier known for its high rates (see Sprint's September 14, 1994 Reply Comments at 11-15 and App. 1, p. 2). Oncor makes two points that Sprint and other supporters of billed party preference have repeatedly stressed throughout this proceeding: that AT&T has inherent advantages in the current environment that will enable it to remonopolize this market segment,[4] and that the aggregators' desire for ever-higher commissions has led to an upward pressure on rates -- even those of AT&T.[5] While Sprint disagrees with Oncor's proposed solution to these problems,[6] Oncor correctly points to

[4] Oncor at 7-8. Oncor also points out (at 5) that AT&T now has the operator services business of 23 out of 23 major hotel chains.

[5] Oncor at 6-7.

[6] Oncor proposes (at 9-10) a Commission-prescribed ceiling on commission payments to aggregators. There is substantial doubt whether the Commission has jurisdiction to impose such a ceiling directly, since commission payments are not a "communications" service (at most, the Commission could only disallow excess payments in prescribing the operator services

the inherently unsound and anti-consumer incentives that now exist.

Turning to CompTel's proposed "ceiling" itself, many of the opponents of the CompTel "ceiling" agree with Sprint's criticisms of the approach: that BPP is needed in order to focus competition on consumers, rather than call aggregators;[7] that a rate ceiling would not substitute for the other benefits of billed party preference described above;[8] that the proposed "ceiling" rates are simply too high;[9] and that it would be unrealistic to assume that the Commission could effectively enforce a ceiling.[10] In the latter regard, it is also worth noting that Bell Atlantic (at 2) opposes NAAG's disclosure proposal on the grounds that it would be impossible to effectively enforce it without acknowledging that the enforcement problems of the CompTel ceiling it endorses are even greater. (This is so because the type of "ceiling"

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rates charged to the public), but even if it had such authority, it would be impossible to enforce such a ceiling effectively.

[7] See, e.g., Florida PSC, Attachment at 2; Ameritech at 1; MCI at 4-5; and Southwestern Bell at 10.

[8] See, e.g., Florida PSC, Attachment at 2; MCI at 2-3; Pacific/Nevada Bell at 4; and Southwestern Bell at 9-10.

[9] See, e.g., Ameritech at 2; Colorado PUC, n.26 at 12; Pacific/Nevada Bell (at 2); and NAAG at 5.

[10] See, e.g., Florida PSC, Attachment at 2; MCI at 3-5; and Southwestern Bell at 3-4.

envisioned by Bell Atlantic would give operator service providers charging rates above the ceiling an opportunity to justify those rates, a far more difficult process than assessing a fine for a clear-cut violation of a Commission disclosure rule.)

III. THERE IS NO REASON TO COUNTENANCE RATES ABOVE THOSE OF THE MAJOR CARRIERS.

Sprint, for the reasons noted above and explained in more detail in its April 12 comments, opposes any form of rate ceiling as a substitute for billed party preference. However, since some parties propose a rate ceiling as an interim measure,[11] Sprint wishes to respond to arguments that any such ceiling must be based on rates that are representative of all carriers' rates,[12] and that individual OSPs are entitled to charge rates above the ceiling if such rates are justified by their own costs.[13] As discussed below, these contentions defy sound public policy and the applicable law.

As a matter of policy, the Commission is directed, in Section 1 of the Act, to regulate in such a way as to make "efficient" communications services available at "reasonable charges...." Competition is an important means to that end, but not an end in itself. Competition is supposed to benefit

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[11] See, e.g., MessagePhone at 3 and Pacific/Nevada Bell at 4-5.

[12] See, e.g., Intellicall at 6 and One Call at 11-13.

[13] See, e.g., Capital Network System ("CNS") at 3; CompTel at 8-9; Oncor at 7-8; One Call at 8-9; and U.S. Osiris at 11-12.

the public through lower prices and better service, not harm the public through higher prices. Clearly, Sprint and MCI would not have become multi-billion dollar competitors in the long-distance market if we had charged three times AT&T's rates for long distance service. That competition would stimulate lower prices was certainly the Commission's expectation when it began formulating its policies for relaxed regulation of non-dominant carriers:[14]

> In order for the OCCs to compete successfully with the established carriers, particularly AT&T, they must either offer services unavailable from the established carriers or, more likely, offer services with rates, conditions and practices more favorable than those offered by the established carriers. ... Hence, as a practical matter, the OCCs must, more often than not, underprice the established carriers to compete successfully.

The Commission, as a matter of policy, should feel no obligation to allow the high rates charged today to be sustained in perpetuity. On the contrary, the fact that alternative operator service providers have, for nearly a decade, continued to charge rates substantially above those of "established carriers" is ample evidence of a failure in the operator services market, one that can be cured only by reorienting the competitive focus on consumers through adoption of billed party preference.

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[14] Competitive Carrier Rulemaking (Notice of Inquiry), 77 FCC 2d 308, 324 (1979).

Nor, contrary to these parties' arguments (see, n.13, above), is the Commission obligated by law to allow each operator service provider to charge rates at whatever level its "costs" could "justify." These parties chiefly rely on statements in cases such as Bluefield Waterworks & Improvement Co. v. Public Service Commission, 262 U.S. 679 (1923), and United States v. FCC, 707 F.2d 610 (D.C. Cir. 1983), to the effect that a utility is entitled to charge rates that will cover its operating expenses and provide a fair return on the capital needed for provisions of its services to the public.[15] However, these cases involved rate-setting for a monopoly service provider. Bluefield, for example, concerned the rates for a monopoly municipal water utility, and U.S. v. FCC concerned the establishment of the proper rate of return for AT&T at a time when it owned the Bell operating companies (monopoly LECs) and had an overwhelmingly dominant position in the U.S. long distance market, as well as a monopoly on international voice traffic.

Far different considerations come into play in a competitive market that is nonetheless subject to regulatory jurisdiction,[16] than in the traditional public utility

[15] Other similar cases cited are those in n.3 at 4 of CNS's comments and n.31 at 9 of One Call's comments.

[16] This need for regulation occurs because, notwithstanding the availability of multiple service providers, the premises owner can restrict provision on its premises to a single provider, which may then rely on exclusivity to set prices for telephone service at that location. Billed party preference would

structure, where a company is or may be forced by law to serve a given area. None of the carriers whose rates are here at issue was or is compelled to provide any service to the public, and none has been required by the Commission to invest any capital in its communications common carrier undertakings. These carriers were free to enter the market and did so at their own risk, and are free to exit the market whenever they choose. Under these circumstances, the specter of unconstitutional, confiscatory action by the Commission simply does not arise.

Even in a monopoly context, the courts have recognized that ratemaking "involves a balancing of the investor and the consumer interests" and "does not ensure that the business shall produce net revenues."[17] And in U.S. v. FCC, supra, the

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obviate this unfortunate situation and the concomitant need for regulation.

[17] Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944) (internal quotation marks and citations omitted).

court emphasized that regulation is intended to prevent excessive prices and that "[f]rom the consumer's point of view, reasonable rates are those which are as low as possible but still allow the industry to provide adequate and efficient service."[18]

The courts have recognized that regulatory commissions have substantial flexibility in ratemaking,[19] and, in the Permian Basin case, specifically rejected the notion that costs are the be-all and end-all of ratemaking:[20]

> The Commission cannot confine its inquiries either to the computation of costs of service or to conjectures about the prospective responses of the capital market; it is instead obliged at each step of its regulatory process to assess the requirements of the broad public interests entrusted to its protection by Congress.

Permian Basin also held (id. at 769, internal quotation marks and case citations omitted):

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[18] 707 F.2d n.4 and accompanying text at 612 (internal quotation marks and case citations omitted).

[19] See, Burlington Northern, Inc. v. U.S., 555 F.2d 637, 640-41 (8th Cir. 1977), and cases cited therein.

[20] In re Permian Basin Area Rate Cases, 390 U.S. 747, 791, rehearing denied, 392 U.S. 917 (1968).

> No constitutional objection arises from the imposition of maximum prices merely because high cost operators may be more seriously affected...than others... or because the value of regulated property is reduced as a consequence of regulation. Regulation may, consistently with the Constitution, limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the Constitutional calculus of reasonableness.[21]

As discussed in Sprint's April 12 comments (at 8-10), the Commission, throughout its history, has exercised its latitude to balance consumer interests against those of carriers by holding that in a competitive market, rates should be at a level the permits an efficient, "bellwether" carrier an opportunity to earn a fair return, but should not be set so as to guarantee each and every carrier, or even the "industry average" carrier, a full return on investment.[22] This policy

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[21] CompTel (n.20 at 9) quotes from Permian Basin in a misleading fashion suggesting that the court held that there must be an opportunity to seek special relief from group rates in order for maximum rate regulation to be consistent with Constitutional concerns. In the passage elided by CompTel, the court stated that there must be an opportunity "either to withdraw from the regulated activity or" to seek special relief from the group rates, and the Court found that the natural gas producers whose rates were there at issue had freedom to exit the market. Permian Basin, supra, at 770, 772-73. As noted above, the operator service providers who now charge rates above a competitive level are likewise free to exit the market, and hence a rate ceiling well below their rates would not implicate confiscation under the Constitution.

[22] See, e.g., Postal Telegraph-Cable Company, et al., 5 FCC 524, 527 (1938); and Charges for Communications Services Between the United States and Overseas and Foreign Points, 12 FCC 29, 62 (1947).

is perfectly consistent with -- and indeed compelled by -- the Commission's view that the purpose of competition is to benefit consumers through better services and lower prices, not to harm consumers with the high rates needed to cover the costs of higher cost or less efficient carriers.[23] There is no evidence on this record that the carriers charging competitive rates would be unable to provide the services offered by those who are charging rates above the competitive level. Thus, there is no reason why rates above those charged by major carriers such as Sprint, AT&T and MCI should be countenanced.

There is also no merit to the claim (see, e.g., One Call at 7) that Section 226 requires allowance of "cost plus" rates for all operator service providers.[24] All that Section 226 required the Commission to examine is whether rates of operator service providers are "just and reasonable" (Section 226(h)(2)), and Section 226(i) makes clear that Section 226 does not alter the Commission's powers under other sections of the Act. Thus, nothing is Section 226 would obligate the

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[23] See, e.g., The Western Union Telegraph Co., 25 FCC 535, 580 (1958).

[24] Even traditional rate of return regulation was never intended to be "cost-plus." Regulatory agencies were never required to accept carrier costs at face value. Rather, regulated utilities were only entitled to recover costs consistent with honest-economic and efficient management. See, Burlington Northern, Inc. v. United States, supra, 555 F.2d at 647.

Commission to deviate from its "bellwether" approach to regulation of rates in a competitive market.

IV. CONCLUSION

For the reasons discussed above and in Sprint's initial comments, the Commission should reject the CompTel invisible rate ceiling and proceed promptly to order implementation of billed party preference.

Respectfully submitted,

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